92-900

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

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MAE G. STIFFLER, Petitioner,

v.

LUTHERAN HOSPITAL, d/b/a
HOOPESTON COMMUNITY
MEMORIAL HOSPITAL,
Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petition for Writ of Certiorari

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## QUESTION PRESENTED

WHETHER THE PRODUCT LIABILITY STATUTE OF LIMITATIONS OR THE HEALING ART MALPRACTICE STATUTE OF LIMITATIONS SHOULD APPLY TO A CLAIM IN WHICH IT IS ALLEGED A HOSPITAL DISTRIBUTED A DEFECTIVE PRODUCT TO A PATIENT.

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MEMORIAL HOSPITAL,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, MAE G. STIFFLER, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding May 13, 1992.

**OPINIONS BELOW**

The opinion of the Seventh Circuit of the United States Court of Appeals is

not published and is reprinted in the Appendix hereto.

The opinion of the United States District Court for the Central District of Illinois, [Judge Baker presiding], is unpublished and is reprinted in the Appendix hereto.

## JURISDICTION

This Court's jurisdiction is evoked under Title 28 U.S.C. Section 1254(1), appealing an Order of the Seventh Circuit Court of Appeals.

The Petitioner filed a products liability claim against the Respondent in the United States District Court for the Central District of Illinois, based on the diversity of citizenship of the parties. The Petitioner is a citizen of the State of Indiana and although the Respondent Hospital is located in the Central District of Illinois, it is believed that its central place of

business is located in South Dakota. The Complaint alleges damages in the amount of Five Hundred Thousand Dollars ($500,000.00). The Plaintiff moved to substitute the manufacturer of the allegedly defective device as the Defendant and the claim against the hospital was dismissed. The claim against the manufacturer was later dismissed. The District Court, Judge Baker presiding, denied the Petitioner's Motion to Reinstate the Respondent Hospital as a defendant under a provision of the Illinois products liability laws which allows such a reinstatement. The Petitioner then appealed this ruling to the Seventh Circuit Court of Appeals, which affirmed the District Court's ruling. The Petitioner now appeals to this Court, pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, 14th Amendment:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

Illinois Revised Statutes, Chapter 110, Section 13-212

Illinois Revised Statutes, Chapter 110, Section 13-213

Illinois Revised Statutes, Chapter 110, Section 2-621

Illinois Revised Statutes, Chapter 110, Section 2-622

See Appendix for full text of Statutes, pages 13-16

## STATEMENT OF THE CASE

Mae Stiffler, a citizen of Indiana, asserts that a medical device described as an Angel Chik Prosthesis, inserted into her body on November 23, 1981 at Hoopeston Hospital, now known as Lutheran Hospital, was defective and caused her injury. This prosthetic device was obtained by the surgeon from the hospital at the time of the surgery. The device was discovered to be defective when it was removed during exploratory surgery on August 4, 1987. It was then determined that the defective device had been the source of problems suffered by the Plaintiff for several years.

The implantation surgery took place in Lutheran Hospital of Hoopeston, Illinois, and Plaintiff was a citizen of Indiana, therefore she filed a Complaint

based on diversity jurisdiction against that hospital in Federal Court on May 10, 1989. The Complaint alleges a product liability theory that the hospital is liable as a distributor of a product under the Doctrine of Strict Liability in Tort.

On August 3, 1989, one day before the expiration of the two year statute of limitations from the date of discovery of an injury, Lutheran Hospital certified by affidavit that Heyer-Schulte Corporation was the manufacturer of the alleged defective device. Accordingly, pursuant to an Illinois statute, Ill.Rev.Stat., Chapter 110, Section 2-621, Mrs. Stiffler dismissed Lutheran Hospital and simultaneously amended her Complaint to name Heyer-Schulte Corporation as Defendant on September 15, 1989. The Complaint was subsequently amended to

name Baxter International, Heyer-Schulte's corporate successor in interest as Defendant. The Court granted Summary Judgment in favor of Baxter International in October of 1990 finding that the applicable product liability statute of limitations had expired before a claim had been filed against them.

The Plaintiff then filed a motion to vacate the dismissal and reinstate the original complaint against distributor Lutheran Hospital as allowed in product liability cases pursuant to Ill.Rev.Stat. Chapter 110, Section 2-621. The Defendant objected to the motion on the basis that the absolute four year statute of limitations for medical malpractice cases had expired as to Lutheran Hospital before the complaint was originally filed.

After a hearing, the trial court ruled as a matter of law that the alleged distribution of a defective product in this case arose out of patient care performed by the hospital and therefor the medical malpractice statute of limitations applied and not the product liability statute of limitations. The court denied the Plaintiffs motion to reinstate the Complaint against Lutheran Hospital on the basis that the medical malpractice statute of limitations had expired before the Complaint was originally filed on May 10, 1989.

## REASONS FOR GRANTING THE WRIT

**THE DECISIONS BELOW DENY THE PETITIONER EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, BY HOLDING THAT A SHORTER STATUTE OF LIMITATIONS APPLIES TO CLAIMS AGAINST HOSPITALS AS DISTRIBUTORS OF PRODUCTS THAN THE STATUTE OF LIMITATIONS THAT APPLIES TO NON-HOSPITAL DISTRIBUTORS OF PRODUCTS IN CLAIMS BASED UPON THE DISTRIBUTION OF A DEFECTIVE PRODUCT.**

This Court has found a denial of equal protection of the laws where a state has created a law that is not discriminatory on its face, but has a discriminatory effect when applied to a particular set of circumstances. Such is the situation in this case. The Petitioner discovered that the implant inside her had malfunctioned and had

caused much of her pain and discomfort, but over four years after the implant was surgically placed within her.

The lower Courts decided that Ill.Rev.Stat. Chapter 110, Section 13-212 applied to this situation. Section 13-212(a), the statute of repose states that a claimant cannot under any circumstances sue a hospital or its staff in any action "whether based upon tort, or breach of contract, or otherwise, arising out of patient care. . ." more than four years after the injurious act or omission occurred. Petitioner's surgery having occurred over four years prior to the discovery of the defect, the claim was held to be untimely under Section 13-212, the medical malpractice statute of repose. The lower courts disagreed with the Petitioner's claim that the products liability statute of limitations,

Ill.Rev.Stat. Chapter 110, Section 13-213, applied.

That statute would have given the Petitioner two years from the discovery of the defective implant in which to file a claim, which she did, alleging a products liability claim against the hospital as the distributor of the defective device.

The lower courts focused on the broad language of the statute of repose and the legislative intent behind the statute. The Court of Appeals for the Seventh Circuit said:

> In order to remedy a perceived crisis in sky-rocketing medical insurance costs, the Illinois General Assembly intentionally drafted the statute of repose with sweeping language:
>
> "[N]o action for damages. . . against any. . . hospital duly

> licensed under the laws of this State, whether based upon tort, or breach of contract or otherwise, arising out of patient care shall be brought. . . more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of injury." (Emphasis in original.) (Quoting Ill.Rev.Stat. Chapter 110, Section 13-212 (1989).)

Appendix page 9. Petitioner contends first, that the lower courts erred in their interpretation of the statute in that it was never intended to be interpreted so broadly as to include product liability actions against hospitals for prosthetic devices; and second, that the lower courts' interpretation of the statute causes a violation of the Petitioner's equal

protection rights under the Fourteenth Amendment of the United States Constitution.

First, the lower courts have interpreted the medical malpractice statute of limitations so broadly that it has effects beyond its legislative intent. While the purpose of the statute may have been to address a perceived crisis in medical malpractice insurance, this broad interpretation of the statute affects causes of action wholly unrelated to medical malpractice and medical malpractice insurance. This cause of action was premised upon, not any negligent medical action or inaction of the Respondent Hospital, but upon its role as a distributor of a defective product, thus this action should not and would not affect medical malpractice insurance premiums. Nevertheless, the lower courts applied the medical

malpractice statute of repose and not the products liability statute of limitations.

The lower courts ruled this way based on an interpretation that supplying a prosthetic implant device to a patient is an act of the hospital "arising out of patient care" as required for the malpractice statute of limitations, Section 13-212 to apply. The Seventh Circuit Court of Appeals ruled that the prosthetic device was a medical service and not a sale, explaining that "[t]he Hospital never placed Stiffler's prosthesis in the stream of commerce; it never promoted it for purchase by the public; and it was in no better position than Stiffler to examine the product and discover the defect." (Appendix, p. 12.)

However, Petitioner was clearly billed for the device, and a trial would

surely show that Respondent Hospital would certainly have been more familiar with the device than would Mrs. Stiffler, a layperson. While the product may not have been available to just any person who wanted one, it was available to any person who needed one. In a similar manner, an automotive replacement part, such as an on board computer component, might not be available to the general public upon request, but is obtainable when needed to effect a repair, and the billing of that part to the car owner would still constitute a sale. In the same sense, a sale transaction occurred in this case as well between the hospital and Mrs. Stiffler.

Although the Court of Appeals cites a Tennessee case which held that the implantation of a prosthesis was not a sale, Appendix p. 11, an Illinois case

has noted that the Illinois "legislature has determined [that for strict tort liability purposes,] blood should be treated differently from drugs, surgical implements, food and other articles intended for use in the human body. . . ." Hill v. Jackson Park Hospital, 39 Ill.App.3d 223, 349 N.E.2d 541 (1976). The implication here is that surgical implements such as implants should be treated just like any other items for products liability purposes. Consequently, the Respondent Hospital should be held to be a distributor and to have conducted a sale of the prosthesis to the Petitioner.

The lower courts also ruled that supplying the prosthetic implant was an act "arising out of a patient care," as required in Section 13-212. The Petitioner's claim arises only in tangential relation to patient care,

while the cause of action is essentially and almost exclusively one of products liability. While it was indeed the Respondent Hospital that provided the prostheses pursuant to an operation, the cause of action makes no claim regarding the patient's care per se, but instead seeks to hold the Respondent liable for supplying, selling, and distributing a defective prosthesis. Petitioner has made no allegation regarding the quality of care, or any other malpractice theory of liability. Thus, to classify this case as being governed by the medical malpractice statute of repose is a mischaracterization of the true cause of action.

However, if this court should defer to the lower courts' rulings regarding the applicability of the medical malpractice statute of repose, this court should still reverse the lower

courts because the statute has been applied in this case in such a way as to violate the Petitioner's Fourteenth Amendment equal protection rights. The Respondent Hospital is being granted a shorter period of exposure to claims for distributing defective products than other distributors of products, solely because of the Respondent's status as a hospital. According to Ill.Rev.Stats. Chapter 110, Section 13-213(b), the statute of limitations for product liability claims may extend up to twelve (12) years from the date that a distributor sells a product.

However, as a result of the lower court rulings in this case, the medical malpractice statute of repose, Section 13-212, limits what would be a products liability claim against other distributors and sellers, to four (4) years when hospitals are the parties

distributing an allegedly defective product to the public in the course of treatment. Consequently, hospitals are only exposed to a maximum of four years from the date of implantation of a prosthetic device in which plaintiffs may file a claim, while the manufacturer and other distributors of products are exposed to twelve years in which plaintiffs may file a claim.

"[A] statute will not be construed as denying equal protection under either the Federal or State Constitution unless the classifications complained of are arbitrary and not based upon a rational difference of condition or situation in relation to the legislative purpose." Hill, 39 Ill.App.3d at 226 (citing Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d (1970), and Williamson v. Lee Optical Co., 348 U.S.

348 U.S. 483, 75 S.Ct. 461, 99 L.Ed.2d 563 (1955).)

The effect of the lower courts rulings in this case are to improperly allow a shorter statute of limitations to be arbitrarily applied to hospitals based only on the fact that it is a hospital, and not based on any other rational difference or condition. This is a violation of the equal protection of the laws.

If the lower courts rulings are affirmed by this Court, the Petitioner's right to equal protection of the laws under the Fourteenth Amendment to the Constitution will be permanently [and irreversibly] foreclosed. Her cause of action will be entirely extinguished, and she will have no recourse to obtain relief.

It could be argued that this ruling has an effect on only a small percentage

of products liability cases for products distributed by hospitals, since the statute of limitations against the manufacturer will not be affected. This is not true however. Few medical devices for implantation into the body are labeled by the manufacturer which makes identifying the manufacturer years after being exposed to the corrosive affects of the body very difficult. This ruling also removes the incentive for manufacturers to make devices safe. It need only last four years if it is a device made by several companies. If it proves defective after that, the manufacturer will not be identifiable and the hospital who distributed it will be safe from a product liability claim. One of the reasons for the lengthy statute of limitations for products liability claims is to cause the manufacturers to make safe products.

The issues presented to the Court by this Petition have effects far beyond those in the present case. The field of prosthetics and implantation of devices in the body has grown steadily and will continue to grow in the future with each advance in science, medicine, and technology. Numerous prosthetic devices presently exist, and many more devices and applications may exist in the future.

This case has far-reaching importance because prosthetics are widely used, and the court must clarify whether a hospital can be held liable as a distributor of a defective prosthesis or any other item, under a products liability theory, or whether such a claim must be governed by medical malpractice rules. The answer to this question will determine the time that a plaintiff has to file a claim in

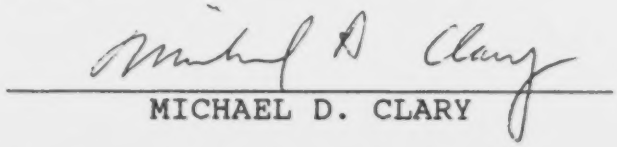
Illinois, and possibly in other states as well. Such an issue would be especially important in cases involving defective devices implanted in the body, where the defect and damage may not be discovered for many years. For example, silicone breast implant cases, of which there may be thousands, would be substantially affected.

It is fundamentally unfair to limit the time for filing product liability actions against hospitals as distributors to periods shorter than those which apply to other distributors solely because they are hospitals. The Defendant claims that the rationale for this special status is to address rising health insurance costs, but any possible connection to health insurance costs that might be found is so tenuous as to be beyond the intent of the Illinois legislature when it enacted the medical

malpractice statute of limitations. The courts below have improperly interpreted Illinois law which has resulted in a violation of Mrs. Stiffler's right to equal protection of the laws under the Constitution of the United States.

## CONCLUSION

Therefore, this Court should issue a Writ of Certiorari to review the decisions of the Federal District Court for the Central District of Illinois and the U.S. Court of Appeals for the Seventh Circuit.



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# APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT DANVILLE

| | | |
|---|---|---|
| MAE G. STIFFLER,<br>Plaintiff, | ) | |
| v. | ) | No. 89-2134 |
| BAXTER INTERNATIONAL, INC., et al.,<br>Defendants. | ) | |

ORDER

Mae Stiffler, a citizen of Indiana, asserts that a medical device inserted into the body in 1981 was defective and caused her extreme discomfort. She clams that she only discovered that the device was defective when it was finally removed during exploratory surgery on August 4, 1987. Because the implantation surgery took place in LUtheran Hospital of Hoopeston, Illinois, Stiffler sued that hospital in federal court on May 10, 1989. Her suit sounded in strict liability.

In August, 1989, Lutheran certified that Heyer-Schulte Corporation was the manufacturer of the device. Accordingly, pursuant to an Illinois statute, Stiffler dismissed Lutheran Hospital and simultaneously amended her complaint to name Heyer-Schulte Corporation as defendant. Ill. Rev. Stat. Ch. 110, Paragraph 2-621 (supp. 1990). In April, 1990, Stiffler again amended her complaint to name Baxter International as defendant. (Baxter was Heyer-Schulte's corporate successor-in-interest.) The court granted summary judgment for Baxter in October, 1990, finding that the applicable period of limitations had run. That action closed this case.

Stiffler now petitions this court to reinstate the complaint against Lutheran Hospital. Stiffler reasons that because she could not sue Baxter

International--the manufacturer of the allegedly defective device--she should be allowed to revive her lawsuit against the original non-manufacturer defendant, which had been dismissed after it named the manufacturer of the device. In this case, that original non-manufacturer is Lutheran Hospital. In support, Stiffler cites Ill. Rev. Stat. ch. 110, paragraph 2-621(b) (Supp. 1990), which in pertinent part holds:

> The plaintiff may at any time subsequent to the dismissal move to vacate the order of dismissal and reinstate the certifying defendant or defendants, provided plaintiff can show. . .that the applicable period of statute of limitation or statute of repose bars the assertion of a strict liability in tort cause of action against the

manufacturer. . .of the product allegedly causing the injury. . .

In response, Lutheran Hospital claims that its status as a hospital prevents it from being sued. Specifically, Lutheran cites Ill. Rev. Stat. ch. 110, paragraph 13-212 (1990), which in relevant part states:

> [N]o action for damages for injury. . . against any. . .hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew. . . of the existence of the injury. . .for which damages are sought in the action,. . .but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission

or occurrence alleged in such action to have been the cause of injury. . .

According to Lutheran, although Stiffler sued within two years of the discovery of her injury, she failed to sue within four years of the 1981 surgery during which the device was inserted into her body. Thus, the defendant asserts, it is immune from suit.

The Illinois courts do not appear to have decided a case in which the plaintiff seeks to vacate the dismissal of a non-manufacturer defendant pursuant to paragraph 2-621 where that non-manufacturer defendant is a hospital. Thus, Illinois does not appear to have determined whether or not paragraph 2-621 overrides the repose concerns of paragraph 13-212. The court determines that it does not.

The language of paragraph 13-212 is quite broad, indicating that it was designed to shield hospitals from a wide array of lawsuits after the four year limit has run. For example, paragraph 13-212 states that "no action," whether sounding in "tort, or breach of contract, or otherwise," may be maintained against a hospital if the action is brought four or more years after the hospital allegedly cause injury. See Ill. Rev. Stat. ch. 110, paragraph 13-212 (1990). That language readily seems to encompass a strict liability action against a hospital. Thus, if the court determines that paragraph 13-212 applies to this case, then Lutheran is immune from suit notwithstanding the revival provisions of paragraph 2-621.

To determine whether paragraph 13-212 applies to this case, the court must

decide whether Stiffler's strict liability suit against Lutheran is one "arising out of patient care." Stiffler argues that her suit does not "arise out of" the care she received at Lutheran. She urges the court to distinguish between Lutheran's delivery of medical care and Lutheran's delivery of medical hardware. Stiffler argues that she seeks to sue Lutheran only in its capacity as a distributor of allegedly defective medical equipment. She does not sue Lutheran over the quality of care she received there. Thus, according to Stiffler, because paragraph 13-212 only applies to lawsuits "arising out of patient care," it does not apply to her lawsuit.

Stiffler's argument is unconvincing, at least given the facts of this case. The only Illinois court to construe the "arising out of patient

care" provision of paragraph 13-212 held that "[t]he phrase 'arising out of' is broad and generally means 'originating from,' 'growing out of,' or 'flowing from.'" Miller v. Tobin, 186 Ill.App.3d 175, 177 (Ill.App.Ct. 1989) (quoting 6 C.J.S. Arise 525, 526 (1975)). Certainly, the delivery of the allegedly defective device to Stiffler by Lutheran grows out of the medical services it rendered to her when she was admitted as a patient. Stiffler could not have purchased the device at a drug store and then only used Lutheran's medical services to have it implanted in her. SHe was not billed separately for the cost of the medical device itself and for the expertise it took to implant it; providing the device was an integral part of providing the medical care. There may indeed be activities undertaken by a hospital that do not

"arise out of patient care"--for example, a hospital-run store selling crutches to the general public. In such a case, a hospital might not avoid a strict liability suit involving the crutches by claiming that the selling of the defective crutches somehow arose out of rendering patient care. But that is not this case.

IT IS THEREFORE ORDERED that the plaintiff's motion to vacate the dismissal of Lutheran Hospital (322) is denied. The case will remain closed.

ENTER: this 9th day of April, 1991.

s/Harold A. Baker

Harold A. Baker
Chief United States District Judge



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In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 91-2088

MAE G. STIFFLER,

*Plaintiff-Appellant,*

*v.*

LUTHERAN HOSPITAL, d/b/a
HOOPESTON COMMUNITY
MEMORIAL HOSPITAL,

*Defendant-Appellee.*

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Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 89 C 2134—**Harold A. Baker**, *Judge.*

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ARGUED FEBRUARY 28, 1992—DECIDED MAY 13, 1992

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Before POSNER, FLAUM, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* This case raises subtle issues about the scope of Illinois' medical malpractice statute of repose. On November 23, 1981, Indiana resident Mae G. Stiffler underwent surgery for a hiatal hernia at the Lutheran Hospital of Hoopeston, Illinois. The operation was a complete success—or so she thought until she began experiencing abdominal pains more than four years later. Exploratory surgery on August 4, 1987 revealed that the source of Stiffler's pain was a prosthetic device which had been medically implanted in her chest cavity during the

hernia operation; apparently, the prosthesis had broken away from its placement and became tangled in her intestines, thereby causing her extreme discomfort.

Following the prosthesis' removal, Stiffler brought this products liability suit against Lutheran on May 10, 1989. She alleged that the prosthesis was defective, so Lutheran—as its distributor—was strictly liable for all her ensuing injuries. Lutheran immediately moved to dismiss her action as barred by the Illinois medical malpractice statute of repose, a law prohibiting suits against hospitals if "brought more than 4 years after the date on which occurred the act or omission" giving rise to the injury. *See* ILL. REV. STAT., ch. 110, § 13-212 (1989). This of course presented a formidable obstacle to the success of her claim, since her injuries stemmed from an operation which had taken place more than seven years before she first filed her complaint. Dismissal was a foregone conclusion; the district court had only to formally rule on Lutheran's motion.

Stiffler didn't give the district court a chance to act. Instead, she dismissed Lutheran on her own accord and simultaneously filed an amended complaint against the prosthesis' manufacturer. With a new defendant—one who did not enjoy the protection of the statute of repose—her only concern was complying with the Illinois statute of limitations for products liability actions. *See* ILL. REV. STAT., ch. 110, §§ 2-621-22 (1989).[1] As it would turn out, however, that was a task easier said then done. She didn't file her amended complaint against the manufacturer until August 17, 1989—a week after the applicable two-year limitations period had expired—and process was not actually

[1] Section 622(d) of the statute of limitations for products liability actions provides that "the plaintiff may bring an action within 2 years after the date on which the claimant knew, or through use of reasonable diligence should have known, of the existence of the personal injury, death or property damage. . . ."

served on the new defendant until nearly eight months later. Naturally, the manufacturer took note of these deficiencies and moved for summary judgment.

Seeing no issue of material fact as to whether Stiffler's amended complaint was barred by the statute of limitations, the district court entered summary judgment in the manufacturer's favor. But Stiffler ventured one last avenue of redress. She motioned to have her original complaint against Lutheran reinstated, arguing as follows: since her suit against the Lutheran sounded in products liability, the viability of her claim was governed coextensively by *both* the statute of repose *and* the Illinois statute of limitations for products liability actions. That would mean that she could still sue Lutheran—notwithstanding the fact that her claim was otherwise barred by the statute of repose—because Lutheran was served with her original complaint in May 1989, a full three months before the products liability limitations period had run.

The district court disagreed with her reasoning and denied her motion. In reaching this conclusion, the court first noted that the statute of repose served as the sole benchmark for evaluating the viability of her claim against Lutheran:

> [The statute of repose] states that "no action," whether sounding in "tort, or breach of contract, or otherwise," may be maintained against a hospital if the action was brought four or more years after the hospital allegedly caused injury. That language readily seems to encompass a strict liability action against a hospital. Thus if the court determines that [the statute of repose] applies to this case, then [the Hospital] is immune from suit . . . (citations omitted).

The court then went on to hold, as a matter of law, that the statute of repose barred Stiffler's claim. From this ruling she now appeals.

Stiffler now contends that the district court committed reversible error by reading the Illinois statute of repose

so broadly as to cover products liability actions. This boils down to a question of statutory construction, and the Supreme Court has directed us to review a district court's construction of state law *de novo*. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S. Ct. 1217 (1991). "In exercising our obligation to provide meaningful appellate review in diversity cases, we must strive to parse state law and, if necessary, forecast its path of evolution." *Ludwig v. C & A Wallcoverings, Inc.*, No. 90-3724, slip op. at 4 (7th Cir. April 3, 1991) (*quoting Belline v. K-Mart Corp.*, 940 F.2d 184, 186 (7th Cir. 1991)). Viewing Stiffler's claim in this light, we conclude that the district court properly determined that the statute of repose—and only the statute of repose—was the appropriate clock for measuring the viability of her suit.

The words of a statute are often the best indicator of legislative intent, *Board of Governors of the Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 372, 106 S. Ct. 681, 688-89 (1986), and the instant case is no exception. In order to remedy a perceived crisis in skyrocketing medical insurance costs, the Illinois General Assembly intentionally drafted the statute of repose with sweeping language:

> *[N]o action for damages* . . . against any . . . hospital duly licensed under the laws of this State, *whether based upon tort, or breach of contract, or otherwise*, arising out of patient care *shall be brought* . . . more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of injury.

ILL. REV. STAT. ch. 110, § 13-212 (1990) (emphasis added). So where's the ambiguity with respect to Stiffler's products liability claim? She brought suit to recover damages; her suit sounds in tort (negligence or strict liability), although she could have just as easily alleged a contract theory (express warranty or implied warranty of merchantability); and nothing in the statute even remotely suggests that products liability actions are a class of suit

exempt from § 13-212's coverage. That means her claim plainly falls within the scope of § 13-212—provided, of course, that the injury arose "out of patient care." We would be hard pressed to imagine a more cut and dry application.

Stiffler correctly points out that the Illinois General Assembly addressed the product liability insurance crisis by enacting distinct statutes of limitations for products liability actions. But contrary to what she asserts, the fact that § 13-212 contains no clearly stated intent to affect these statutes does not mean that products liability claims are immune from its application. It is a well-established principle of statutory construction that silence is not an invitation to embark on a path of judicial lawmaking. *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 461 U.S. 624, 643, 103 S. Ct. 2045, 2055 (1983). Doing so would only be reasonable under very special circumstances, such as where a well-established agency or judicial statutory construction has been brought to the attention of the legislature, and the legislature has not sought to alter that interpretation even though it has amended the statute in other respects. *Id.*; *United States v. Rutherford*, 442 U.S. 544, 554 n.10, 99 S. Ct. 2470, 2476 n.10 (1979). Neither exception is applicable here.

Recent Illinois caselaw reinforces our conclusion that § 13-212 covers products liability actions. In *Hayes v. Mercy Hospital and Medical Center*, 557 N.E.2d 873 (1990), the Illinois Supreme Court was called upon to interpret § 13-212's phrase "or otherwise." After considering the policies underlying the statute of repose, the Court opined:

> We believe that the term demonstrates the General Assembly's desire at the time it originally enacted the statute to limit a physician's exposure to liability for damages for injury or death arising out of patient care *under all theories of liability*, whether then existing or not.

*Id.* at 898 (emphasis added). Had the Illinois Supreme Court meant to exempt products liability actions from the

scope of the statute of repose, it certainly could have chosen more restrictive language than "all theories of liability." Indeed, if anything, we should take this language as a signal to construe the phrase "or otherwise" as liberally as the statute permits.

Stiffler has a back-up argument: her injury did not in fact arise "out of patient care," and therefore § 13-212 cannot act as a bar to her suit against the Hospital. To support this proposition, she argues that her injury resulted not from the Hospital's medical care, but rather from the Hospital's negligent choice and distribution of a defective prosthetic device. That negligent act, she maintains, was unrelated to her medical treatment. We disagree.

The fatal flaw in this argument is that the distinction between medical care and the distribution of medical materials is not as clearly delineated as Stiffler would have us believe. Quite the contrary, medical materials are so inextricably linked with every step of today's treatment processes that their use almost *per se* arises "out of patient care." Take, for instance, a prosthetic device like the one implanted in Stiffler. It has an intrinsic value in and of itself. It is a real good with a real cost. But the Hospital is not in the business of "selling" or "supplying" this device to anyone that walks through its doors, and with good reason—no one except hiatal hernia patients would need them. Rather, what it sells are the skill and services necessary to alleviate illnesses through the use of a wide range medical materials, as complex as the elaborate CAT scan or as simple as an ordinary hospital bed. *See, e.g., Gardner v. McDonald*, [1975-77 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 8053, at 16,450 (Tenn. Ct. App. 1977) (implantation of prosthesis was not a sale). That is precisely what Stiffler received.

"[A]rising out of patient care" was intended to be construed broadly. *See Miller v. Tobin*, 542 N.E.2d 173, 177 (Ill.App. 1989). However, like the district court, we recognize that there may indeed be certain activities undertaken by a hospital which are not part of a patient's

medical treatment. For example, a hospital-run gift shop which sells non-prescription medicine to the general public might be held strictly liable if the product ultimately proved harmful for consumer use. But that is not this case. The Hospital never placed Stiffler's prosthesis in the stream of commerce; it never promoted it for purchase by the public; and it was in no better position than Stiffler to examine the product and discover the defect. We therefore hold that Stiffler's products liability claim—at least as it is as alleged—arose of "out of patient care" within the meaning of § 13-212. Accordingly, the district court properly concluded that her claim was barred.

The other issues raised by Stiffer are without merit and warrant no additional discussion. The district court's denial of Stiffler's motion to reinstate her original complaint is therefore AFFIRMED.

A true Copy:
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*Clerk of the United States Court of Appeals for the Seventh Circuit*

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—5-13-92

2-621. Product liability actions.

Section 2-621. Product liability actions. (a) In a product liability action based in whole or in part on the doctrine of strict liability in tort commenced or maintained against a defendant or defendants other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in whole or in part on the doctrine of strict liability in tort against such defendant or defendants shall toll the applicable statute of limitation and statute of repose relative to the defendant or defendants for purposes of asserting a strict liability in tort cause of action.

(b) Once the plaintiff has filed a complaint against the manufacturer or manufacturers, and the manufacturer or manufacturers have or are required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability tort claim against the certifying defendant or defendants, provided the certifying defendant or defendants are not within the categories set forth in subsection (c) of this Section. Due diligence should be exercised by the certifying defendant or defendants in providing the plaintiff with the correct identity of the manufacturer or manufacturers, and due diligence shall be exercised by the plaintiff in filing an action and obtaining jurisdiction over the manufacturer or manufacturers.

The plaintiff may at any time subsequent to the dismissal move to

vacate the order of dismissal and reinstate the certifying defendant or defendants, provided plaintiff can show one or more of the following:

(1) That the applicable period of statute of limitation or statute of repose bars the assertion of a strict liability in tort cause of action against the manufacturer or manufacturers of the product allegedly causing the injury, death or damage; or

(2) That the identity of the manufacturer given to the plaintiff by the certifying defendant or defendants was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant or defendants the court shall again dismiss the certifying defendant or defendants; or

(3) That the manufacturer no longer exists, cannot be subject to the

jurisdiction of the courts of this State, or, despite due diligence, the manufacturer is not amenable to service of process; or

(4) That the manufacturer is unable to satisfy any judgment as determined by the court; or

(5) That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

(c) A court shall not enter a dismissal order relative to any certifying defendant or defendants other than the manufacturer even though full compliance with subsection (a) of this Section has been made where the plaintiff can show one or more of the following:

(1) That the defendant has exercised some significant control over the design or manufacture of the

product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage; or

(2) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(3) That the defendant created the defect in the product which caused the injury, death or damage.

(d) Nothing contained in this Section shall be construed to grant a cause of action in strict liability in tort or any other legal theory, or to affect the right of any person to seek and obtain indemnity or contribution.

(e) This Section applies to all causes of action accruing on or after September 24, 1979.

P.A. 82-280; Section 2-621 added by P.A. 83-350, Section 1, eff. Sept. 14, 1983.

Amended by P.A. 84-1043, Section 1, eff. Nov. 26, 1985.

2-622. Healing art malpractice.

Section 2-622. Healing art malpractice. (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

1. That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught

within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action. If the affidavit is filed as to a defendant who is a physician licensed to treat human ailments without the use of drugs or medicines, and without operative surgery, a dentist, a

podiatrist, or a psychologist, the written report must be from a health professional licensed in the same profession, with the same class of license, as the defendant. For affidavits filed as to all other defendants, the written report must be from a physician licensed to practice medicine in all its branches. In either events, the affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit, but information which would identify the reviewing health professional may be deleted from the copy so attached.

2. That the affiant was unable to obtain a consultation required by paragraph 1 because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days after the filing of the complaint. The defendant shall be excused from answering or otherwise pleading until 30 days after being served with a certificate required by paragraph 1.

3. That a request has been made by the plaintiff or his attorney for examination and copying of records pursuant to Part 20 of Article VIII of this Code and the party required to comply under those Sections has failed

to produce such records within 60 days of the receipt of the request. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days following receipt of the requested records. All defendants except those whose failure to comply with Part 20 of Article VIII of this Code is the basis for an affidavit under this paragraph shall be excused from answering or otherwise pleading until 30 days after being served with the certificate required by paragraph 1.

(b) Where a certificate and written report are required pursuant to this Section a separate certificate and written report shall be filed as to each defendant who has been named in the complaint and shall be filed as to each defendant named at a later time.

(c) Where the plaintiff intends to rely on the doctrine of "res ipsa loquitur", as defined by Section 2-1113 of this Code, the certificate and written report must state that, in the opinion of the reviewing health professional, negligence has occurred in the course of medical treatment. The affiant shall certify upon filing of the complaint that he is relying on the doctrine of "res ipsa loquitur".

(d) When the attorney intends to rely on the doctrine of failure to inform of the consequences of the procedure, the attorney shall certify upon the filing of the complaint that the reviewing health professional has, after reviewing the medical record and other relevant materials involved in the particular action, concluded that a reasonable health professional would

have informed the patient of the consequences of the procedure.

(e) Allegations and denials in the affidavit, made without reasonable cause and found to be untrue, shall subject the party pleading them or his attorney, or both, to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with reasonable attorneys' fees to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal. In no event shall the award for attorneys' fees and expenses exceed those actually paid by the moving party, including the insurer, if any. In proceedings under this paragraph (e), the moving party shall have the right to depose and examine any and all reviewing health professionals who prepared reports used in conjunction

with an affidavit required by this Section.

(f) A reviewing health professional who in good faith prepares a report used in conjunction with an affidavit required by this Section shall have civil immunity from liability which otherwise might result from the preparation of such report.

(g) The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619.

(h) This Section does not apply to or affect any actions pending at the time of its effective date, but applies to cases filed on or after its effective date. P.A. 82-280, Section 2-622, added by P.A. 84-7, Section 1, effective August 15, 1985. Amended by P.A.86-646, Section 1, eff. Sept. 1, 1989. For effective date and application of P.A.

84-7, see note following Section 2-114 of this chapter.

13-212. Physician or hospital

Section 13-212. Physician or hospital. (a) Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in

such action to have been the cause of such injury or death.

(b) Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 8 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death where the person entitled to bring the action was, at the time the cause of action accrued, under the age of 18 years; provided, however, that in no event may the cause of action be brought after the person's 22nd birthday. If the person was under the age of 18 years when the cause of action accrued and, as

a result of this amendatory Act of 1987, the action is either barred or there remains less than 3 years to bring such action, then he or she may bring the action within 3 years of July 20, 1987.

(c) If the person entitled to bring an action described in this Section is, at the time the cause of action accrued, under a legal disability other than being under the age of 18 years, then the period of limitations does not begin to run until the disability is removed.

P.A. 82-280, Section 13-212, eff. July 1, 1982. Amended by P.A.82-783, Art. III, Section 43, eff. July 13, 1982; P.A. 83-235, Section 1, eff. Sept. 8, 1983; P.A. 85-18, Section 1, eff. July 20, 1987; P.A. 85-907, Art. II, Section 1, eff. Nov. 23, 1987; P.A. 86-1329, Section 4, eff. Jan. 1, 1991.

13-213. Product liability

Section 13-213. Product liability. (a) As used in this Section, the term:

(1) "alteration, modification or change" or "altered, modified, or changed" means an alteration, modification or change that was made in the original makeup characteristics function or design of a product or in the original recommendations, instructions and warnings given with respect to a product including the failure properly to maintain and care for a product.

(2) "product" means any tangible object or goods distributed in commerce, including any service provided in connection with the product. Where the term "product unit" is used, it refers to a single item or unit of a product.

(3) "product liability action" means any action based on the doctrine

of strict liability in tort brought against the seller of a product on account of personal injury, (including illness, disease, disability and death) or property, economic or other damage allegedly caused by or resulting form the manufacture, construction, preparation, assembly, installation, testing, makeup, characteristics, functions, design, formula, plan, recommendation, specification, prescription, advertising, sale, marketing, packaging, labeling, repair, maintenance or disposal of, or warning or instruction regarding any product. This definition excludes actions brought by State or federal regulatory agencies pursuant to statute.

(4) "seller" means one who, in the course of a business conducted for the purpose, sells, distributes, leases, assembles, installs, produces,

manufactures, fabricates, prepares, constructs, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce.

(b) Subject to the provisions of subsections (c) and (d) no product liability action based on the doctrine of strict liability in tort shall be commenced except within the applicable limitations period and, in any event, within 12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier, of any product unit that is claimed to have injured or damaged the plaintiff, unless the defendant expressly has warranted or promised the product for a longer period

and the action is brought within that period.

(c) No product liability action based on the doctrine of strict liability in tort to recover for injury or damage claimed to have resulted from an alteration, modification or change of the product unit subsequent to the date of first sale, lease or delivery of possession of the product unit to its initial user, consumer or other non-seller shall be limited or barred by subsection (b) hereof if:

(1) the action is brought against a seller making, authorizing, or furnishing materials for the accomplishment of such alteration, modification or change (or against a seller furnishing specifications or instructions for the accomplishment of such alteration, modification or change when the injury is claimed to have

resulted from failure to provide adequate specifications or instructions,) and

(2) the action commenced within the applicable limitation period and, in any event, within 10 years from the date such alteration, modification or change was made, unless defendant expressly has warranted or promised the product for a longer period and the action is brought within that period, and

(3) when the injury or damage is claimed to have resulted from an alteration, modification or change of a product unit, there is proof that such alteration, modification or change had the effect of introducing into the use of the product unit, by reason of defective materials or workmanship, a hazard not existing prior to such alteration, modification or change.

(d) Notwithstanding the provisions of subsection (b) and paragraph (2) of subsection (c) if the injury complained of occurs within any of the periods provided by subsection (b) and paragraph (2) of subsection (c), the plaintiff may bring an action within 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, of the existence of the personal injury, death or property damage, but in no event shall such action be brought more than 8 years after the date on which such personal injury, death or property damage occurred. In any such case, if the person entitled to bring the action was, at the time the personal injury, death or property damage occurred, under the age of 18 years, or under a legal disability, then the period of limitations does not begin to run until

the person attains the age of 18 years, or the disability is removed.

(e) Replacement of a component part of a product unit with a substitute part having the same formula or design as the original part shall not be deemed a sale, lease or delivery of possession or an alteration, modification or change for the purpose of permitting commencement of a product liability action based on the doctrine of strict liability in tort to recover for injury or damage claimed to have resulted from the substitute part when such action would otherwise be barred according to the provisions of subsection (b) of this Section.

(f) Nothing in this Section shall be construed to create a cause of action or to affect the right of any person to seek and obtain indemnity or contribution.

(g) The provisions of this Section 13-213 of this Act apply to any cause of action accruing on or after January 1, 1979, involving any product which was in or entered the stream of commerce prior to, on, or after January 1, 1979.

P.A. 82-280, Section 13-213, eff. July 1, 1982. Amended by P.A. 83-707, Section 1, eff. Sept. 23, 1983; P.A. 85-907, Art. II, Section 1, eff. Nov. 23, 1987; P.A. 86-1329, Section 4, eff. Jan. 1, 1991.